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Supreme Court, U.S.
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No. 00-758

IN THE
Supreme Court of the United States

UNITED STATES POSTAL SERVICE,
Petitioner,

v.

MARIA A. GREGORY,
Respondent.

On Writ of Certiorari to the United States Court of Appeals for the Federal Circuit

BRIEF FOR RESPONDENT

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QUESTION PRESENTED

Whether the Merit Systems Protection Board, in reviewing the lawfulness of a decision by the Postal Service to remove an employee from employment, may rely on prior disciplinary actions that are still the subject of pending grievance proceedings.

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Letter from Douglas A. Tulino, Manager, Labor Relations Policies and Programs, United States Postal Service, to Ronald G. Brown, Vice President, Nat'l Ass'n of Letter Carriers, AFL-CIO (Apr. 12, 2001) 15

Office of Policy and Evaluation, MSPB, *Issues of Merit* (Dec. 1999), *available at* http://www.mspb.gov/studies/99decnws.pdf 29

United States Postal Service, *City Delivery Carriers Duties and Responsibilities (Handbook M-41)* (Mar. 1998), *available at* http://www.nalc.org/cau/pdf/manuals/m41.pdf 8

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BRIEF FOR RESPONDENT

The Postal Service has devoted the entirety of its opening brief to challenging a broad rule under which not only the Merit Systems Protection Board ("MSPB") but also all federal employers are prohibited from relying on prior disciplinary actions that are still the subject of pending grievance proceedings. This is remarkable because, as respondent explained at the certiorari stage, there is no reason to believe that the court below embraced that broad rule. And respondent has no occasion to defend that broad rule, for she prevails under the rule that the court of appeals did adopt: a narrow rule prohibiting *the MSPB* from relying on prior disciplinary actions that are still the subject of pending grievance proceedings. That narrow rule requires agencies to make a choice between forgoing reliance on unarbitrated prior

disciplinary actions and postponing MSPB proceedings until arbitration proceedings are completed.

The narrow rule, which the Postal Service's brief does not challenge, is unquestionably correct and has long been applied in the grievance arbitration context. It prevents an agency from doing what the Postal Service attempted here: to bootstrap its way to victory by first obtaining affirmance of the grievant's termination in reliance on unarbitrated disciplinary actions and then turning around to end the pending arbitrations — on the theory that the grievant is no longer an employee and therefore not entitled to pursue grievances. The narrow rule is also entirely consistent with the larger framework of MSPB decisional law.

This Court should therefore affirm the court of appeals' judgment on the basis of the narrow rule. Even if the Court were to reject the narrow rule, it should at least leave undisturbed the aspect of the court of appeals' decision holding that respondent's removal cannot stand in light of the arbitral decision overturning one of the three prior disciplinary actions in respondent's record. In a brief filed below, the Postal Service expressly and correctly conceded that this aspect had been properly decided. There is no reason to allow the Postal Service to turn its back on that representation now.

An even more appropriate disposition would be to dismiss the writ of certiorari as improvidently granted. *First*, given that the Postal Service attacks only a broad rule that is not implicated and ignores a narrow rule that fully supports the judgment below, this case simply does not provide a proper setting to evaluate either rule. *Second*, the Postal Service waived its right to challenge either the broad or the narrow rule by failing to address the merits of either rule in its brief in the court of appeals. *Finally*, now that an arbitrator has set

aside one of respondent's three prior disciplinary actions, a new penalty decision must be made without regard to that action. It is implausible that the new decision will again call for respondent's termination. Thus, whether this Court embraces or rejects either the broad or the narrow rule is of only academic significance to this case.

STATEMENT

1. This case involves an issue of labor relations in the Postal Service. Postal employees have organizational and bargaining rights similar to those of employees in the private sector. *See* 39 U.S.C. § 1209. That is so because the Postal Reorganization Act, Pub. L. No. 91-375, 84 Stat. 719 (1970), "established the Postal Service as an independent establishment of the executive branch with very limited application of federal employee law." *Bacashihua v. MSPB*, 811 F.2d 1498, 1501 (Fed. Cir. 1987); *see* 39 U.S.C. §§ 201, 1005. The Postal Service therefore must engage in collective bargaining with unions representing its employees. *See id.* §§ 1203, 1206. Respondent is a member of the National Association of Letter Carriers, whose collective bargaining agreement with the Postal Service governed the terms of her employment. *See* Agreement Between National Association of Letter Carriers, AFL-CIO, and U.S. Postal Service (1998-2001), *available at* http://www.nalc.org/cau/index.html ("Agreement").

The majority of Postal Service employees are not within the scope of most of the provisions of the Civil Service Reform Act of 1978 ("CSRA"). *See* 39 U.S.C. § 410(a); *see also* 5 U.S.C. § 2105(e). So-called "preference eligible" Postal Service employees — veterans and their dependents, *see* 5 U.S.C. § 2108(3) — share some of the rights of civil servants. *See* 39 U.S.C. § 1005(a)(2); 5 U.S.C. § 7511(a)(1)(B)(ii); *see generally Gribcheck v. United States*

Postal Service, 87 M.S.P.R. 473, 477-81 (2001). Respondent is a preference-eligible employee by virtue of her Army service in the early 1970s. *See* Informal Brief of Petitioner Maria A. Gregory, Att. P-4, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed Feb. 8, 2000) ("Respondent's Fed. Cir. Br.").

Under both the applicable collective bargaining agreement and (where applicable) the CSRA, the Postal Service may terminate employees only if it can sustain its burden of proving that there is just cause. Agreement Art. 16.1; 5 U.S.C. § 7513(a). That principle prohibits removal on the basis of minor infractions, *see* Postal Service Br. 25 n.6, but may still permit removal on the basis of "progressive discipline" — *i.e.*, where the employer can show that, despite escalating prior disciplines intended to correct the employee's behavior, the employee has continued to engage in improper conduct, *see id.* at 25-26 & n.7; *see also* Agreement Art. 16.1; *id.* at 193.

When the Postal Service imposes discipline, the union can challenge it through the collective bargaining agreement's grievance process. *See* 39 U.S.C. § 1206(b); *Cornelius v. Nutt*, 472 U.S. 648, 650, 652 (1985). As is common in such agreements, the collective bargaining agreement here involved calls for a multi-step process. Steps 1, 2, and 3 permit informal appeals to, respectively, a supervisor, the local postmaster, and a regional labor-relations official. *See* Agreement Art. 15.2. In these informal appeals, the parties are expected to (and often do) resolve disputes amicably, by compromising on a lesser charge or penalty.[1] Where the

[1] *See* Agreement Art. 15.3.A ("The parties expect that good faith observance, by their respective representatives, of the principles and procedures set forth above will result in settlement or withdrawal of substantially all grievances initiated hereunder at the lowest possible step and recognize their obligation to achieve that end.").

parties cannot reach such a settlement, the union is entitled to appeal the Step 3 decision to an impartial arbitrator, whose decision is final and binding. *See id.* Art. 15.4.[2]

The majority of disciplinary actions against Postal Service employees can be challenged only through the grievance process outlined above. *See, e.g., Mays v. United States Postal Service*, 995 F.2d 1056, 1057 (Fed. Cir. 1993); *Royals v. Tisch*, 864 F.2d 1565, 1567 (11th Cir. 1989); *Winston v. United States Postal Service*, 585 F.2d 198, 202 (7th Cir. 1978). Preference-eligible employees, however, have an alternative remedy, at least where the disciplinary action consists of removal or a suspension of more than 14 days. *See* 5 U.S.C. § 7512. In such cases, they may — instead of appealing to arbitration — appeal the disciplinary action to the MSPB. *See id.* §§ 7511(a)(1), 7513(d); JA 28-29; Agreement Art. 16.9. That Board reviews agency disciplinary actions to ensure that they are "supported by a preponderance of the evidence" and "in accordance with law." 5 U.S.C. § 7701(c)(1)(B) and (2)(C).

2. Respondent Maria Gregory began her postal career in 1985, when she accepted a clerical position at the post office in Hinesville, Georgia. *See* MSPB Transcript ("Tr.") 468-69. Respondent became a part-time letter carrier in 1987 and was promoted to full-time regular letter carrier in 1993. *See* Tr. 470. In 1995, respondent was again promoted to Letter Technician T-6, a position above regular letter carrier in

[2] Whereas arbitration decisions reviewing the disciplinary actions of certain other federal agencies are subject to further judicial or FLRA review, *see Cornelius*, 472 U.S. at 656; 5 U.S.C. §§ 7121(f), 7122, that is not true in the postal context, *see Fuentes v. United States Postal Service*, 54 M.S.P.R. 4, 7 (1992); *see generally Hall v. United States Postal Service*, 26 M.S.P.R. 233, 235-36 (1985).

which she was responsible for overseeing five mail routes and delivering the mail when one of the regularly assigned carriers was unavailable. *See* Pet. App. 15a, 21a, 38a. Respondent simultaneously rose to the rank of shop steward in the local letter carriers' union. *See* Tr. 452. Respondent was known as a model employee. Even the postmaster who ultimately fired respondent acknowledged that, throughout her employ, she had "done a very good job." Tr. 287. A postmaster who had previously supervised her testified that respondent was "one of the best employees she ever had." Pet. App. 39a.

Things changed in 1995. At that time, respondent was sexually harassed by a co-worker. *See* Tr. 474. When respondent complained to her superiors, they were unwilling to do anything more than give the co-worker a slap on the wrist. In addition, shortly thereafter, management prohibited respondent from talking to other letter carriers, supposedly to prevent further incidents. *See* Tr. 478-80. Respondent then filed complaints with the Equal Employment Opportunity Commission and other authorities, which further caused relations with her supervisors to become strained. *See* Tr. 477-81. By early 1997, the Hinesville postmaster was looking for ways "to get rid of her." *See* Tr. 437-39, 446. In the following months, respondent — who had never been disciplined before, *see* Tr. 476 — was subjected to a quick succession of disciplinary actions for minor infractions.

The first incident took place on April 7, 1997, when respondent left work early to take her ill daughter to the doctor. *See* Tr. 486. Although respondent believed that she had received permission to go, her supervisor charged her with insubordination and imposed a 7-day suspension. *See* JA 47-48. After a grievance was filed, the Postal Service reduced the penalty to a letter of warning. *See* JA 43-44. Despite the reduced penalty, respondent's union continued to

grieve the disciplinary action. *See* JA 36-37. Eventually, this would result in the discipline's invalidation by an arbitrator who concluded that respondent was justified in believing that she had permission to leave. *See infra*, p.11; JA 3-16.

A second incident took place on April 18, 1997, when a small bundle of mail that had been misplaced earlier in the day turned up in respondent's truck at the end of her route. *See* JA 45-46. When respondent reported this to a supervisor, she was told to leave it for delivery by another carrier the next day. Nevertheless, management later charged respondent with intentionally delaying the mail and suspended her for 14 days. *See* JA 45. After a grievance was filed, the Postal Service reduced the penalty to a 7-day suspension. *See* JA 41-42. A further grievance appeal did not resolve the dispute. *See* JA 20-21. The union requested arbitration, but the Postal Service refused to proceed on the theory that, after respondent was later terminated, she was no longer entitled to the benefit of the grievance arbitration process. *See infra*, p.12.

Third, respondent was disciplined for various incidents occurring in July 1997, including allegedly earning overtime without first submitting an overtime-request form (described more fully below). *See* JA 38-40. Respondent's supervisors suspended her for 14 days. *See* JA 38. Further grievance appeals did not result in an amicable resolution. *See* JA 34-35; JA 22-23. The union later appealed the matter to an arbitrator, but the Postal Service again refused to proceed. *See infra*, p.12.

3. A fourth and final incident (which would result in respondent's termination) occurred on September 13, 1997. When letter carriers at the beginning of their work day expect that they will need more time than their usual shift to deliver their route, they are to submit to their supervisor a paper slip

(a so-called "Form 3996") requesting either overtime or help from other carriers. *See* Pet. App. 16a; United States Postal Service, *City Delivery Carriers Duties and Responsibilities (Handbook M-41)* at 43-46 (Mar. 1998), *available at* http://www.nalc.org/cau/pdf/manuals/m41.pdf. On the morning of September 13, respondent submitted a Form 3996 in which she estimated that, in light of heavy mail volume and other factors, delivering the route that had been assigned to her that day (a route that she had handled only a few times previously, *see*, *e.g.*, Tr. 465-67, 531) would exceed a regular 8-hour work day by three-and-a-half hours. *See* Pet. App. 2a, 17a. Three-and-a-half hours was not substantially more than what respondent had requested (and what her supervisors had approved) on previous occasions. *See*, *e.g.*, Tr. 148-53, 267, 308, 510; Pet. App. 24a n.4.

But respondent's supervisor, William Cox, determined, in hindsight, that respondent's estimate was off by 1.3 hours. *See* Pet. App. 2a; JA 19. He considered this overestimation particularly egregious because respondent had stopped her delivery truck to pick up first-class mail that she had seen lying in the street — something Cox considered a waste of time. *See* Tr. 136-37; Pet. App. 28a. Although no carrier in Hinesville had ever been disciplined on this ground, *see* Tr. 211-12, 360, Cox concluded that respondent's faulty estimate was cause for severe punishment, *see* Tr. 223-24. On September 18, 1997, Cox therefore sent respondent a notice charging her with failure to perform her duties in a satisfactory manner and proposing that she be fired. *See* JA 31-33; Pet. App. 2a. On November 17, 1997, the Postal Service issued a decision to remove respondent, effective November 26, 1997. *See* JA 24-30; Pet. App. 2a. After more than 12 years of dedicated service, respondent had been fired for overestimating by a little over one hour the more

than 10 hours it took to deliver a route on which she was not the regular carrier.

At the advice of her then-counsel, respondent opted to challenge her removal not by filing a grievance but by appealing to the MSPB. On September 11, 1998, an MSPB Administrative Judge rejected respondent's appeal. *See* Pet. App. 13a-43a. Although the Administrative Judge recognized that "a removal for one instance of failure to perform duties satisfactorily may appear unreasonable," *id.* at 37a, the Administrative Judge stated that respondent's prior disciplinary record made termination appropriate, *see id.* at 37a-38a; *see also id.* at 3a, 6a. Respondent then appealed to the full MSPB, but, on October 20, 1999, that body affirmed without opinion. *See id.* at 9a-10a.

4. While respondent's MSPB appeal in "Case 4" (her removal case) was just beginning in 1998, the grievance proceedings concerning "Cases 1, 2, and 3" (the prior disciplinary actions) were already well under way. In each of those cases, all steps in the grievance process except arbitration were completed before year-end 1997. *See* JA 36-37 (Step 3 decision for Case 1); JA 20-21 (same for Case 2); JA 22-23 (same for Case 3). The union therefore requested that the cases be scheduled for arbitration, and they were set for expedited hearings. *See* Respondent's Fed. Cir. Br. Att. E. The Postal Service, however, was in no hurry to have the arbitrations proceed. Under settled MSPB precedent, a defeat in arbitration would mean that the prior disciplinary actions could not be considered in support of respondent's termination, which would undermine the validity of that

action.[3] Accordingly, the Postal Service embarked upon a strategy of delay.

Thus, the Postal Service first removed the cases from the expedited arbitration docket and referred them to regular, non-expedited arbitration. *See id.*, Att. F; *see generally* Agreement Art. 15.4.C.2. That tactic did not buy much time, however, for the regular arbitration hearings were soon scheduled for August 1998. *See* Respondent's Fed. Cir. Br. Att. G. To avoid the August hearing dates, the Postal Service therefore invoked the so-called "Step 4" procedure of the collective bargaining agreement, on the pretense that an issue of contract interpretation should be resolved before the cases could be arbitrated. *See id.*, Atts. G, H; *see also* Agreement Art. 15.4.B.5; *id.* at 184.[4] Because there was no such issue, however, the Postal Service in September 1998 was forced to agree to refer the cases back to the arbitration docket. *See* Respondent's Fed. Cir. Br. Att. J. All three cases were then rescheduled for arbitration hearings in January 1999. *See id.*

When the January hearing dates approached, the Postal Service asserted a new ground for delay. It pointed out that, on September 11, 1998, the Administrative Judge in the MSPB case had sustained respondent's termination. *See id.*, Att. I. Based on that fact, the Postal Service took the position that respondent was no longer an employee.[5] Th the Postal

[3] *See Jones v. Department of Air Force*, 24 M.S.P.R. 429, 431 (1984) ("Since [the appellant's] earlier ten-day suspension . . . was reversed by grievance, it was effectively cancelled and thus should not be considered in determining a reasonable penalty for the current charge.").

[4] When cases present an interpretive issue under the collective bargaining agreement, parties can appeal them to "Step 4" at headquarters levels, followed by national arbitration. *See* Agreement Arts. 15.2, 15.4.D.

[5] *See* Agreement Art. 16.5 ("[T]he employee shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement with the Union or through exhaustion of the grievance-arbitration procedure. A preference eligible who chooses to appeal a suspension of more than fourteen (14) days or his/her discharge to the Merit Systems Protection Board (MSPB) rather than through the grievance-arbitration procedure shall remain on the rolls (non-pay status) until disposition of the case has been had either by settlement or through exhaustion of his/her MSPB appeal.").

Service claimed, respondent was no longer entitled to the benefit of the grievance process. *See id.* ("[T]he grievant has been taken off the rolls. Therefore, the National Agreement does not and rather cannot provide coverage for her at this juncture.").[6] When the union objected on the ground that respondent's termination had not yet become final, the Postal Service again referred the cases to Step 4. *See id.*, Att. J.

Because it had no basis for the Step 4 referral, the Postal Service in due course agreed that the cases should be rescheduled for arbitration. *See id.*, Att. K. Case 1 finally went to a hearing before an arbitrator in July 1999. *See* JA 3. That hearing resulted in an August 20, 1999, decision, in which the arbitrator found for respondent and expunged the letter of warning from her record. *See* JA 13-16. That award preceded the decision of the full MSPB in Case 4 by two months, *see* Pet. App. 9a, but respondent, who was no longer represented by counsel at that time, did not know to bring the arbitrator's decision to the MSPB's attention. The Postal Service, which of course also was a party to both the arbitration and the MSPB proceeding, likewise neglected to inform the MSPB of the arbitral decision.

Cases 2 and 3 were about to go to arbitration in November 1999 when the full MSPB issued its decision in October 1999,

[6] The Postal Service's argument was based on a national arbitration decision holding that "pre-discharge grievances" do not "survive a discharge which had been made final through the grievance-arbitration machinery." *Infra*, pp. 26-27.

affirming the Administrative Judge's decision without opinion. The Postal Service wasted no time to use the MSPB's decision in support of its move to have the remaining arbitration proceedings terminated. The Postal Service again took the position that, because the full MSPB had now affirmed respondent's termination, she was no longer an employee. The union then appealed Cases 2 and 3 to Step 4, *see* Respondent's Fed. Cir. Br. Att. L, where they remained in limbo for some time.

5. Meanwhile, respondent appealed her MSPB defeat to the Federal Circuit, *see* 5 U.S.C. § 7703(a)(1), (b)(1), which must set aside any MSPB action found to be "arbitrary, capricious, an abuse of discretion, or otherwise not in accordance with law," 5 U.S.C. § 7703(c)(1) (Pet. App. 57a). In her *pro se* brief, respondent argued that, because her discipline in Case 1 (the letter of warning) had been overturned by an arbitrator, her removal was unlawful because "the progression of discipline no longer exists." Respondent's Fed. Cir. Br. at [6]; *see id.* at [2] ("no progression exists"). Respondent attached a copy of the arbitrator's award (JA 3) to her brief. *See* Respondent's Fed. Cir. Br. Att. D. Respondent also argued that the MSPB had erred by relying on "prior unarbitrated suspensions." *Id.* at [2]. In its brief, the Postal Service did not respond to the merits of respondent's arguments, arguing only that respondent had waived them by neglecting to raise them before the MSPB. *See* Informal Brief and Supplemental Appendix for Respondent United States Postal Service at 17, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed Mar. 17, 2000) ("Postal Service's Fed. Cir. Br.").

In a unanimous decision, the Federal Circuit held that respondent's removal could not stand. In its opinion, the court reasoned that, although "[t]here is no doubt that prior disciplinary actions are an important factor when considering

whether a particular penalty is reasonable under given circumstances, . . . there can also be no doubt that a penalty determination cannot be supported by an earlier prior disciplinary action that is subsequently reversed." Pet. App. 6a. Taking "judicial notice of the fact that one of the actions — the May 1997 Letter of Warning — was overturned by an arbitrator in July 1999 and ordered expunged from Ms. Gregory's personnel record," *id.* at 5a, the court stated:

> In this case, Ms. Gregory had challenged, via grievance proceedings, at least part of the prior disciplinary history that was relied upon by the Postal Service and Board in determining the reasonableness of the penalty. At the time of the Board decision, at least, it appears that these challenges were pending. If the grievances were sustained and the prior actions ordered expunged — as, indeed, happened in at least one instance in this very case — the foundation of the Board's [penalty analysis pursuant to *Douglas v. Veterans Administration*, 5 M.S.P.B. 313 (1981)] would be compromised. Accordingly, we hold that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits.

Id. at 7a. Finding that the MSPB had accordingly "abused its discretion," the court of appeals held that "the Board's determination that the penalty of removal was reasonable must be set aside." *Id.*

The Postal Service then filed a petition for panel rehearing, but not rehearing en banc. In that petition, the Postal Service challenged (what it termed) "the panel's *apparent* holding that a final agency decision, still pending review, is so inherently unreliable that it may not be considered by the agency or the board in selecting the appropriate penalty for a subsequent

adverse action." Petition for Rehearing of the Court's Opinion Dated May 15, 2000, at 5, *Gregory v. United States Postal Service*, No. 00-3123 (Fed. Cir. filed June 29, 2000) (emphasis added); *see also id.* at 8 ("apparent holding"); *id.* at 9 ("the Court's decision appears to hold"); *id.* at 11 ("[t]he Court's broad apparent holding"). According to the Postal Service, the Federal Circuit's "apparent holding" ran counter both to a general administrative-law principle that agency decisions must be presumed valid until reversed and to specific MSPB precedent permitting federal employers to rely on prior discipline still subject to grievance. *See id.* at 9-14.

The Postal Service conceded, however, that the MSPB's decision could not stand. As the rehearing petition put it: "The Postal Service does not contest that portion of the Court's opinion vacating the board's decision and remanding the appeal to the MSPB for further consideration in light of the arbitrator's August 28, 1999 decision. The Postal Service agrees that, on remand, it would be appropriate to exclude the May 13, 1997 suspension letter [*i.e.*, Case 1] from consideration in deciding the appropriate penalty." *Id.* at 4-5 n.3. "Ultimately," the Postal Service explained, "the Court is correct that it is appropriate to return this case to the MSPB so that the board may make a determination whether the agency would have taken the same action based upon Ms. Gregory's two remaining disciplinary actions." *Id.* at 7 & n.5.

Presumably finding the Postal Service's arguments (raised for the first time on rehearing) waived, the court of appeals denied the Postal Service's rehearing petition without opinion or dissent. *See* Pet. App. 44a. The Postal Service then filed a petition for a writ of certiorari, which this Court granted. *See* 121 S. Ct. 1076 (2001).

Meanwhile, respondent's union sought to have respondent's arbitrations in Cases 2 and 3 reactivated, reasoning that, in light of the Federal Circuit's decision, respondent was once again an employee and therefore again entitled to participate in the grievance process. *See* Opposition to United States Postal Service's Motion to Stay the Board's May 9, 2001, Order at 9 n.9, *Gregory v. United States Postal Service*, No. AT-0752-98-0261-M-1 (MSPB filed June 11, 2001). The Postal Service, however, refused to proceed, and still refuses to proceed even now. *See id.* (citing Letter from Douglas A. Tulino, Manager, Labor Relations Policies and Programs, United States Postal Service, to Ronald G. Brown, Vice President, Nat'l Ass'n of Letter Carriers, AFL-CIO (Apr. 12, 2001) ("It would be premature to consider any further administration action on these two grievances until the Supreme Court has an opportunity to conduct their review.").

SUMMARY OF ARGUMENT

I. The Postal Service asserts that the court of appeals adopted a broad rule under which federal employers, when taking disciplinary action against an employee (including termination), may not rely on prior disciplinary actions that are still the subject of a pending grievance. But that was not the court of appeals' holding. The court actually rested its decision on a narrow rule, under which *the MSPB*, in evaluating whether there is just cause for a disciplinary action, may not take into account a prior discipline that remains the subject of a pending grievance. Because respondent prevails under even that narrow rule, she has no occasion to rely on the broad rule. The Postal Service's attack on the broad rule therefore has no bearing on the outcome here.

At the certiorari stage, the Postal Service argued that there is no practical difference between the broad and the narrow

rules, because federal employers will be forced, as a practical matter, to apply the same rule that the MSPB must use in reviewing their disciplinary actions. The Postal Service does not repeat that argument here, and for good reason. Grievance proceedings concerning a prior disciplinary action will usually have been resolved by the time an appeal from a later disciplinary action reaches the MSPB. Even if the grievance is still pending, the MSPB can defer its decision until the grievance has been resolved. Thus, it simply does not follow from the narrow rule that federal employers will themselves be foreclosed from relying on prior disciplinary actions that are still subject to grievance.

The narrow rule, moreover, is hardly a novel invention. It has long been applied by labor arbitrators, both in the postal context and elsewhere. Arbitrators have rejected the notion that the narrow rule boils down to the same thing as the broad rule, and have recognized that the narrow rule can easily be accommodated through careful scheduling of successive challenges. Thus, they have recognized that the narrow rule simply places the employer to a choice between agreeing to a postponement of the later proceedings or forfeiting reliance on prior discipline.

The narrow rule thus sets forth a salutary principle, for it prevents employers from engaging in strategic gamesmanship, as the Postal Service appears to have done here. Absent the narrow rule, employers have an incentive to delay the grievance proceedings concerning prior disciplinary actions, pressing ahead with the termination appeal, securing affirmance of the termination by relying on the prior disciplinary actions, and then refusing to proceed with the grievance proceedings on the theory that the employee has been terminated and therefore is no longer entitled to pursue grievances. Moreover, the narrow rule promotes efficiency by eliminating the need for duplicative proceedings and

ensures that challenges to prior disciplinary actions will be litigated in the appropriate forum.

The narrow rule also fits comfortably within the existing framework of MSPB precedent. The MSPB has long recognized that it is fundamentally unfair to affirm a termination in reliance on prior disciplinary actions without affording the employee an opportunity to challenge the merits of those actions. Embracing the narrow rule is also consistent with the MSPB's recognition that it must enforce employee rights rooted in collective bargaining agreements. Here, the collective bargaining agreement has been interpreted to provide that, when an employee challenges a later disciplinary action, that action may not be supported on the basis of a prior disciplinary action that is still being challenged. That principle binds the MSPB just as it binds labor arbitrators.

The Postal Service wrongly suggests that the narrow rule is rendered unnecessary by two specific safeguards recognized under MSPB case law. Although the MSPB allows collateral attacks of prior disciplinary actions, it evaluates such attacks under a deferential "clear error" standard — even where the prior disciplinary actions have never gone to arbitration. And, although the MSPB has discretion to reopen its decisions if prior disciplinary actions are later set aside in arbitration, that is no comfort if, as happened here, the employer relies on the MSPB's removal decision to terminate arbitration proceedings.

II. Even if this Court does not affirm the court of appeals' judgment on the basis of the narrow rule, it should, at a minimum, leave that judgment undisturbed insofar as the court of appeals vacated the MSPB decision and remanded for a new penalty determination untainted by reliance on Case 1. In its petition for rehearing in the court of appeals, the Postal Service conceded that this aspect of the court of appeals'

decision was correct, and, even now, the Postal Service concedes that a remand is appropriate. The Postal Service nevertheless suggests that, because the arbitral decision in Case 1 was not properly included in the MSPB record, the court of appeals should not have vacated the MSPB's decision. That suggestion should be rejected. In light of its concession below, the Postal Service is estopped from challenging the court of appeals' holding. Moreover, the Postal Service failed to include its suggestion in its petition for a writ of certiorari. In any event, the court of appeals properly took judicial notice of the arbitral decision in Case 1.

III. This Court should dismiss the writ as improvidently granted for at least three reasons. *First*, this case is an inappropriate setting in which to evaluate the merit of either the broad or the narrow rule. The broad rule has never been adopted by any court, and respondent does not need it to prevail and therefore has no reason to defend it. The narrow rule is not challenged in the Postal Service's opening brief, applies in only a small class of cases, and will — in light of the collective bargaining agreement — continue to bind the Postal Service in any event. *Second*, the Postal Service failed to preserve its arguments below. When respondent urged adoption of the narrow rule, the Postal Service never addressed the argument on the merits, arguing (unsuccessfully) only that respondent had failed to preserve the argument before the MSPB. *Finally*, both the broad and the narrow rules are of only academic significance to this case. In light of the arbitral decision in Case 1, it is clear that respondent's removal cannot stand regardless of the decision in this case.

ARGUMENT

I. THE COURT OF APPEALS WAS CORRECT IN HOLDING THAT THE MSPB MAY NOT RELY ON PRIOR DISCIPLINARY ACTIONS THAT ARE THE SUBJECT OF PENDING GRIEVANCES.

According to the Postal Service, the Federal Circuit in the decision below adopted a broad rule under which *federal employers*, when taking disciplinary action (particularly removal), may not rely on prior disciplinary actions that are still subject to challenge. That the Postal Service should read the opinion of the court below in a way that is so contrary to its own interests is remarkable, for nothing in the court of appeals' opinion compels that reading. As respondent explained at the certiorari stage, the much more plausible reading of the court of appeals' opinion is that it adopts the following narrow rule: that *the MSPB*, in adjudicating whether there is just cause for a disciplinary action imposed pursuant to principles of progressive discipline, may not base its determination on a prior discipline that is still subject to pending grievance. Even if the court of appeals *had* embraced the broad rule (which it did not), respondent would have no need to rely on it, and this Court would have no occasion to pass on it: respondent can readily prevail under the narrow rule.[7] The Postal Service's merits brief does not

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[7] *See, e.g., Johnson v. De Grandy*, 512 U.S. 997, 1003 n.5 (1994) (respondent is entitled to "urge any grounds which would lend support to the judgment below") (internal quotation marks omitted); *United States v. Arthur Young & Co.*, 465 U.S. 805, 814 n.12 (1984) ("[O]ur precedents establish that a prevailing party may urge any ground in support of the judgment, whether or not that ground was relied upon or even considered by the court below."); *Smith v. Phillips*, 455 U.S. 209, 215 n.6 (1982) ("Respondent may . . . defend the judgment below on any ground which the law and the record permit, provided the asserted ground would not expand the relief which has been granted.").

challenge the narrow rule. That is not surprising. The narrow rule has long been applied in arbitration, properly discourages strategic gamesmanship, and is in accord with the larger framework of MSPB jurisprudence.

A. There Is No Reason To Believe That the Court of Appeals Embraced the Broad Rule That the Postal Service Attributes to It.

1. According to the Postal Service, the Federal Circuit's opinion adopted a broad rule that applies directly to employing federal agencies. Under that broad rule, federal agencies subject to review in the MSPB may not rely on prior disciplines that are still subject to grievance or appeal when taking later disciplinary action against an employee.[8] Because the Postal Service deems the broad rule both extremely harmful to federal agencies' interests (*see* Br. 32-37) and unsupported by precedent (*see* Br. 18-23), one might have expected that the Postal Service would attribute that rule to the court of appeals only if it were crystal clear that the court actually adopted it. In fact, the court of appeals nowhere espoused the broad rule that the Postal Service attributes to it. The plain text of the opinion below indicates that the court adopted a narrow rule under which only *the MSPB* must refrain from relying on prior disciplinary actions that are still

[8] *See, e.g.*, Br. 15 ("The question presented in this case is whether *federal employers* may take account of prior disciplinary actions that are subject to pending grievances.") (emphasis added); Br. 18 ("This case involves a challenge to the well-settled MSPB rule that, in disciplining or removing employees pursuant to the CSRA, *federal employers* may take account of prior disciplinary actions against an employee, even when such actions are subject to pending grievance proceedings.") (emphasis added); Br. 21 ("[T]he question presented here: whether, in disciplining or removing an employee, *an agency* may rely upon prior disciplinary actions that are 'the subject of pending grievance or arbitration procedures.'") (emphasis added).

subject to pending grievance when the MSPB adjudicates whether there is just cause for subsequent discipline.

For example, the court of appeals stated that "*the Board* erred when it rested its analysis of the reasonableness of the penalty upon [Gregory's] three prior disciplinary actions, at least some of which were then the subject of grievance proceedings." Pet. App. 5a (emphasis added). The court noted that, "[a]t the time of *the Board* decision, at least, it appears that these challenges were pending." *Id.* at 7a (emphasis added). The court reasoned that "[i]f the grievances were sustained and the prior actions ordered expunged . . . the foundation of *the Board's* Douglas [*i.e.*, penalty] analysis would be compromised." *Id.* (emphasis added). The court concluded that, "[b]ecause those prior actions that were the subject of ongoing grievance proceedings could not be used, *the Board* abused its discretion in relying upon them." *Id.* (emphasis added). In short, the court faulted *the Board* for relying on unadjudicated prior disciplinary actions — not the Postal Service.[9]

The Postal Service, however, points to parts of the court of appeals' opinion framed in the passive voice. Thus, it draws this Court's attention to a statement "'that, as a matter of law, consideration may not be given to prior disciplinary actions that are the subject of ongoing proceedings challenging their merits.'" Br. 9, 38 (quoting Pet. App. 7a). Similarly, it points to a sentence stating that "prior disciplinary actions that are subject to ongoing proceedings may not be used to support the reasonableness of a penalty." Pet. App. 1a-2a (cited at

[9] Parts of the Postal Service's brief seem to acknowledge as much. *See, e.g.*, Br. 15 ("The Federal Circuit held that *the MSPB* erred when . . . *the Board* relied upon respondent's prior disciplinary actions in affirming the Postal Service's decision to remove respondent, when those actions remained subject to pending grievances.") (emphases added).

Br. 38). Because these sentences are framed in the passive voice, they do not indicate *who* must refrain from doing the considering or using. But the opinion nowhere states that *agencies* must so refrain, and, in light of the balance of the opinion, which is framed in terms of the MSPB, that is an unjustifiable leap.[10]

2. That the Postal Service's merits brief ignores this sensible reading of the court of appeals' opinion is all the more puzzling in light of what occurred at the certiorari stage. There, respondent clearly explained that "the terms of the Federal Circuit's opinion do not state that agencies may never rely on unresolved priors in imposing disciplinary action; the court of appeals' opinion states only that *the MSPB* may not rely on unresolved priors in sustaining disciplinary action." Br. in Opp. 16. Respondent explained that, in particular, nothing in the opinion suggested that the court of appeals would view the MSPB as erring if it were to uphold "an agency's disciplinary action in reliance on priors that, although still subject to grievance when the agency acted, had become final by the time the MSPB decided." *Id.*

Although the Postal Service's merits brief altogether ignores the narrow rule, the Postal Service did confront it in its certiorari reply. *See* Reply Br. 2-3. There, the Postal Service did not contradict the premise of respondent's observation — *i.e.*, that the court of appeals' opinion is better

[10] That is particularly so because the court of appeals stated that "[t]here is no doubt that prior disciplinary actions are an important factor when considering whether a particular penalty is reasonable under given circumstances." Pet. App. 6a. It is unlikely, to say the least, that the court would have made that statement while embracing the broad rule. It would no doubt have occurred to the court of appeals — no less than to the Postal Service — that the broad rule might pose an obstacle to agencies' consideration of prior disciplinary actions in many circumstances.

read to prohibit only *the MSPB* from relying on unadjudicated prior disciplinary actions. Instead, the Postal Service suggested that the narrow rule in practical effect boils down to the same thing as the broad rule. *See id.* In particular, it asserted that the possibility that the court of appeals had embraced only the narrow rule "is little comfort . . . to the numerous federal agencies whose decisions are reviewable by the MSPB. If, as the Federal Circuit held, 'prior disciplinary actions that are subject to ongoing proceedings may not be used [before the MSPB] to support the reasonableness of a penalty,' Pet. App. 1a-2a, then for practical purposes federal agencies — who must defend their actions before the MSPB — may not consider such prior disciplinary actions in calibrating the punishment for recidivist employees." *Id.* at 2 (brackets in original).

Again, the Postal Service's view is bewildering in its aggressive insistence on reading the court of appeals' opinion against its own interests. Plainly, the narrow rule is not "for practical purposes" (or for any other purposes) the same as the broad rule. In the ordinary course, grievances concerning earlier disciplines will have been resolved by the time an appeal from a later disciplinary action makes its way to the MSPB. And, in the rare case where a prior discipline is still subject to a grievance by the time the MSPB is ready to hear the appeal, the case can easily be continued to allow the grievance process concerning the earlier action to run its course. Given these arrangements, agencies will be able to rely on an employee's prior record to precisely the same extent as they always have.

B. The Narrow Rule That the Court of Appeals Did Embrace Has Long Been Applied in Arbitration Decisions That Are Binding Upon the Postal Service.

The narrow rule is hardly a novel invention by either respondent or the Federal Circuit. The narrow rule has long been applied in arbitration — as the Postal Service itself knows well. In a 1977 decision, a panel of arbitrators held that, in an arbitration challenging the termination of a postal employee, it was not free to rely on a prior discipline that, at the time, was "scheduled to be heard in Arbitration." *Arbitration in the Matter of United States Postal Service and National Post Office Mail Handlers*, Grievance No. MC-S-0874-D, at 7 (Nat'l Arb. Panel June 18, 1977) (per Paul J. Fasser, Jr.) ("*Fasser Decision*").[11] "Until that appeal is finally adjudicated," the panel explained, "it has no standing in this proceeding." *Id.*

This decision was issued in national arbitration, and therefore is as binding on the Postal Service as would be a provision of the collective bargaining agreement itself. *See* Agreement Art. 15.2 Step 4. Moreover, this decision arose under — and interpreted — a national collective bargaining agreement covering all four major postal unions, and is therefore applicable to virtually all postal workers. For these reasons, the Postal Service has been compelled to observe it ever since. *See, e.g., Arbitration Between National Association of Letter Carriers and United States Postal Service*, Case No. E94 N-4E-D 96075418, Analysis and Award at 16 (Nat'l Arb. Panel Apr. 19, 1999) (per Carlton J. Snow) ("*Snow Decision*") ("practice of giving unresolved grievances no standing in removal hearings").

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[11] Copies of this and other unpublished arbitral decisions cited in this brief have been lodged with the Clerk of this Court.

The notion that adoption of the narrow rule automatically results in adoption of the broad rule has been rejected. As one arbitrator responded: "That conclusion does not necessarily follow." *Arbitration Between United States Postal Service and National Association of Letter Carriers*, Case No. D90N-4D-D 95076768, at 19 (Reg'l Arb. Panel Mar. 20, 1996) (per Joseph A. Sickles) ("*Sickles Decision*"). "[C]ertainly [the employer] can take disciplinary action which it feels is appropriate." *Id.*; *see id.* at 21 ("I specifically reject the [Postal Service's argument] that this award would preclude Management from issuing a letter of proposed removal when there are outstanding yet unresolved prior disciplines."). But it must do so "with the understanding that there is some peril attached to that action because one (1) or more of the past elements may be overturned." *Id.*

Thus, the narrow rule's consequences are usually limited to the scheduling of successive proceedings. *See id.* ("[T]he issue presented here deals more with a scheduling problem."); *id.* ("[T]he problem once again becomes one of scheduling, rather than precluding Management from taking appropriate action."). The narrow rule requires the employer to make a simple choice: agree to schedule hearings in the proper order or forfeit reliance on prior disciplinary actions still under review. In light of that rule, the usual practice is to "postpon[e] a hearing" concerning a later discipline until earlier grievances have been resolved. *Snow Decision* at 16; *see id.* at 17 ("practice . . . of delaying decisions pending resolution of underlying grievances"). The employer loses the benefit of reliance on prior disciplinary actions only if, faced with a clear choice, it insists on pressing ahead. *See Sickles Decision* at 19-20 ("the Postal Service was aware of

the potential problems in this case"); *id.* at 21 ("[t]he parties were fully aware of the potential problem from the outset").[12]

C. The Narrow Rule Is Sensible and Correct.

It is further clear just why arbitrators (and, now, the Federal Circuit) have embraced the narrow rule: the narrow rule is necessary to eliminate incentives to engage in strategic gamesmanship. Whereas the Postal Service contends that the broad rule gives unions an incentive to delay arbitration of prior disciplinary actions in the hope of precluding reliance on them, *see* Br. 32-37, the narrow rule is necessary to avoid giving *employers* an incentive to delay arbitration of prior disciplinary actions in the hopes of thwarting those arbitrations entirely.

1. Collective bargaining agreements commonly govern only current employees. Thus, terminated employees usually lose protection and are no longer permitted to participate in the grievance process. *See supra*, pp. 10-11 n.5 (quoting Agreement Art. 16.5). A national arbitral decision interpreting the collective bargaining agreement between the Postal Service and respondent's union has reached precisely

[12] This rule is observed not only in the postal context, but in labor arbitration throughout the public and private sector. *See, e.g., Metal Trades Council, Philadelphia Federal Employees and Department of Defense, Navy, Philadelphia Naval Shipyard*, 87 FLRR 2-1497, LAIRS 18045 (July 31, 1987) ("The 10-day suspension grievance having yet to be finalized leaves this arbitrator no alternative but to disregard its effect and impact on rendering a decision in this case."); *Arbitration Between Island Creek Coal Co. and United Mine Workers*, Case No. 93-23-96-06, 1996 WL 607192 (Mar. 15, 1996) (where a prior suspension is still the subject of arbitration, it "cannot be held against the Grievant in this action and will not be considered in this Award"); *see id.* ("An attempt was made to accommodate the Parties until such time as the prior discipline could be resolved. Failing to do so, the Company determined that this discharge would rise or fall solely on the events of February 15, 1996, and the Grievant's prior work record.").

that result. *See Arbitration Between United States Postal Service and National Association of Letter Carriers*, Case No. H7N-5P-C 1132 (Nat'l Arb. Panel Mar. 26, 1990) (per Richard Mittenthal). That decision held that "pre-discharge grievances" do not "survive a discharge which [has] been made final." *Id.* at 7.

Accordingly, failure to recognize the narrow rule would permit unseemly bootstrapping. Without the narrow rule in place, employers have an incentive to manipulate the system by delaying the grievance proceedings concerning prior disciplinary actions, pressing ahead with the termination appeal, securing affirmance of the termination by relying on the prior disciplinary actions, and then turning around to have the grievance proceedings concerning the prior disciplinary actions dismissed on the theory that the employee has been terminated and therefore is no longer entitled to pursue grievances. If successful, this strategy would allow employers to circumvent principles of progressive discipline and to deprive both the union and the employee of collectively bargained (and statutorily protected) contractual rights.

The facts of this very case illustrate the concern. The Postal Service's apparent strategy throughout this case has been to have the MSPB proceeding leap-frog the pending grievance proceedings — thereby enabling it first to rely on respondent's three prior disciplinary actions in seeking MSPB affirmance of respondent's removal and then to insulate the prior disciplinary actions from review on the theory that, once respondent's removal had been affirmed by the MSPB, respondent was no longer an employee and therefore no longer entitled to the benefit of the grievance machinery. Indeed, that this was the Postal Service's strategy appears to be undisputed. At the certiorari stage, respondent described this strategy in detail. *See* Br. in Opp. 18-19 & n.12. The

Postal Service did not respond to this showing in its reply brief, and it does not respond to it now.

Even where a collective bargaining agreement does not cut off grievance rights upon termination (or where the discipline relying on unarbitrated prior disciplinary actions falls short of termination), the narrow rule is still a salutary one. As the Postal Service in effect concedes, where a prior disciplinary action is overturned through the grievance process, reopening of MSPB proceedings is necessary to avoid unfairness. *See* Br. 31 ("the ability to reopen MSPB decisions when the outcome of a grievance undermines an MSPB decision eliminates any unfairness"). Postponing the MSPB proceedings until the prior disciplinary actions have been arbitrated eliminates the need for reopening, thereby helping to conserve the MSPB's scarce resources. Moreover, the narrow rule promotes comity between different decision-makers by assuring that the MSPB does not resolve claims that are and should be litigated before labor arbitrators.

2. With the narrow rule in place, neither the employer nor the union has any incentive to delay arbitration proceedings concerning prior disciplinary actions. Indeed, because a terminated employee is usually without income while arbitration proceedings are pending, the union has every incentive to expedite those proceedings. *Cf. Milner v. Department of Justice*, 87 M.S.P.R. 660, 665 (2001). And it is a matter of simple logic that, in the normal course, challenges to prior disciplinary actions will be resolved sooner than challenges to later ones, and that grievances concerning prior disciplinary actions therefore will usually have been resolved by the time the MSPB is ready to decide. *See Snow Decision* at 13 ("The parties concede that the situation in dispute arises rarely and that underlying grievances generally do not remain unresolved at the time of a removal hearing.").

Indeed, if anything, grievance proceedings usually proceed at a faster pace than MSPB proceedings. The collective bargaining agreement here in question calls for an arbitration decision in well under one year. *See* Agreement Arts. 15.2, 15.4. In contrast, the MSPB took almost two years to decide this case, and that appears to be par for the course. *See* Office of Policy and Evaluation, MSPB, *Issues of Merit* (Dec. 1999), *available at* http://www.mspb.gov/studies/99decnws.pdf. Thus, a later-initiated MSPB proceeding will rarely leap-frog an earlier-initiated grievance proceeding.

The Postal Service nevertheless suggests that grievance proceedings usually take longer to resolve than MSPB proceedings. But its single item of evidence is the assertion that "[r]espondent's grievances challenging the June 1997 and August 1997 suspensions are still pending after more than three years." Br. 34. It is difficult to comprehend how the Postal Service, given its own manipulation of the scheduling in the underlying arbitration proceedings, can make that assertion with a straight face. As explained above and at the certiorari stage (and never contradicted by the Postal Service), the failure of respondent's grievances to proceed to arbitration is due entirely to the Postal Service's own purposeful delay. *See supra*, pp. 9-12; *see also* Br. in Opp. 18 ("That respondent's grievances are still pending is due entirely to the Postal Service's own delay."). The Postal Service's reliance on the fruits of its own dilatory efforts as a basis for justifying a rule visiting harsh consequences on the victim of those efforts brings to mind the pun about the boy who, after murdering his parents, begged the court to have mercy on an orphan.

In sum, the narrow rule will rarely result in delay, and, where it does, that delay will be short. That is a small price to pay for a rule that prevents considerable injustice and, at a

minimum, inefficient and duplicative reopening of proceedings.[13]

D. The Narrow Rule Fits Comfortably Within the Existing Framework of MSPB Jurisprudence.

The Postal Service further suggests that the court of appeals adopted a rule that is contrary to a vast body of long-standing MSPB precedent. *See* Br. 18. In particular, the Postal Service argues, the Federal Circuit's rule is inconsistent with a body of precedent in which the MSPB held that "'an agency may rely on a record of past discipline even where a prior disciplinary action is the subject of a pending grievance.'" Br. 22 (quoting *Freeman v. Department of Transp.*, 20 M.S.P.R. 290, 292 (1984)). But the Postal Service's assertion hinges upon the premise that the court of appeals adopted the broad rule. As already explained, that view is

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[13] At the certiorari stage, the Postal Service suggested that even this small price is too much to pay. *See* Reply Br. 3 ("a rule requiring the MSPB to delay its decisions would contravene the intent of Congress in enacting the [CSRA]," because "one of the purposes of that Act was to *streamline* the appeals process"). But the MSPB has general authority to permit continuances that are "consistent with the interests of fairness." 5 U.S.C. § 7701(i)(1); *see also* 5 C.F.R. § 1201.51(b). Nothing suggests that Congress intended to prohibit the MSPB from using its general authority in this particular set of circumstances. *See Key v. United States Postal Service*, 31 M.S.P.R. 197, 200 (1986) ("[w]e shall . . . abstain and defer to the District Court's ruling on [an issue also presented in the case before the MSPB]"); *Rice v. Department of Treasury*, 52 M.S.P.R. 317, 321 (1992) ("It is the Board's policy to stay its proceedings when criminal proceedings involving the same matter are pending."); *see generally Roberson v. Department of Health & Human Services*, 24 M.S.P.R. 240, 241-42 (1984) (availability of continuance may further "principles of equity and justice"); *cf. Snow Decision* at 17 ("Neither language in the parties' agreement nor evidence of any past practice established that the parties intended to prevent an arbitrator from granting a continuance in a removal case for the purpose of allowing an underlying grievance to be resolved.").

entirely conjectural. *See supra*, pp. 21-22. And the narrow rule, far from being contrary to MSPB precedent, is strongly supported by the MSPB's existing jurisprudential framework.

1. While the MSPB has said that *an agency* does not necessarily act unlawfully when it relies on prior disciplinary actions that are still under review, *see* Postal Service Br. 22 & n.5, it does not appear that the MSPB has ever expressly addressed the question presented here: whether *the MSPB itself* may rely, in affirming a termination, on prior disciplinary actions that are still the subject of pending grievance proceedings. Indeed, in cases where the MSPB affirmed a termination that was imposed in reliance on prior disciplinary actions that were still subject to grievance when either the agency or the administrative judge acted, the MSPB often was careful to point out that the grievance proceedings had been resolved by the time the matter reached the full Board.[14]

If the MSPB had confronted the precise issue here presented, it likely would have agreed with the Federal Circuit, for the narrow rule is entirely consistent with the MSPB's larger decisional framework. The MSPB has broadly acknowledged that "[f]undamental fairness requires that the Board not rely on charges which have never been proven." *Howard v. Department of Army*, 6 M.S.P.R. 205, 206

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[14] *See, e.g., Morgan v. Department of Defense*, 63 M.S.P.R. 58, 61 (1994) ("The agency stated that the union withdrew its request for arbitration before the administrative judge issued his decision, that the appellant's grievance concerning the suspension was denied, and that the suspension has become final."); *Harrison v. Department of Treasury*, 42 M.S.P.R. 614, 622 (1989) (pointing out that arbitral decision denying grievance was issued after termination but before administrative judge's decision); *Ramseur v. Department of Navy*, 16 M.S.P.R. 104, 106 n.3 (1983) (appellant "did not proffer with his petition any evidence that the [prior disciplinary] action was overturned in the grievance procedure").

(1981). For that reason, the MSPB has held that it is inappropriate to rely on prior disciplinary actions that the employee has never been able to challenge. *See Bolling v. Department of Air Force*, 8 M.S.P.B. 658, 660 (1981). For that same reason, the MSPB has recognized that it is inappropriate to rely on prior disciplinary actions that have been vacated. *See Jones*, 24 M.S.P.R. at 431 ("Since [the appellant's] earlier ten-day suspension . . . was reversed by grievance, it was effectively cancelled and thus should not be considered in determining a reasonable penalty for the current charge.").

These MSPB decisions necessarily imply that it is not "in accordance with law" (5 U.S.C. § 7701(c)(2)(C)) for the MSPB to rely, in making a "just cause" determination, on a prior disciplinary action that has already been set aside or that could not have been challenged. If that is so, then, plainly, it is also not "in accordance with law" to rely on a prior disciplinary action that, while grieved, has not been arbitrated and that, by virtue of the termination being affirmed, will never be arbitrated in the future. The Federal Circuit was therefore correct in holding that, insofar as the MSPB overlooked the inconsistency, it acted unlawfully. *See* 5 U.S.C. § 7703(c)(1).

2. That conclusion is particularly apt in the postal context. With this Court's express approval, *see Cornelius*, 472 U.S. at 659 & n.13, 665, the MSPB has long held that, "where the provisions of a collective bargaining agreement establish non-discretionary policy under which an agency operates, the provisions of the agreement shall be treated by the Board in the same manner as are provisions of the agency's regulations. The Board will, therefore, enforce employee rights derived from such a negotiated agreement." *Robinson v. United States Postal Service*, 28 M.S.P.R. 681, 684 (1985); *see Senior v. United States Postal Service*, 85

M.S.P.R. 283, 288 (2000) ("The Board treats the provisions of a collective bargaining agreement in the same way it treats agency regulations."); *Jordan v. United States Postal Service*, 32 M.S.P.R. 404, 407 (1987) ("[T]he Board has consistently held that it has inherent and broad enforcement authority and will enforce employee rights derived from . . . negotiated collective bargaining agreements.").

Based on this principle, where an applicable collective bargaining agreement provides that disciplinary actions may no longer be considered after some time, *see, e.g.*, Agreement Art. 16.10; *see generally* Postal Service Br. 33-34, the MSPB will not consider them, *see Lewis v. Department of Air Force*, 51 M.S.P.R. 475, 485 (1991) ("[T]he Board will discount a prior action used to support the appropriateness of an agency-imposed penalty when a law, rule or regulation prohibits the consideration of such actions after a period of time. A collective bargaining agreement is treated as a provision of the agency's regulations.") (citations omitted); *Deutsch v. United States Postal Service*, 39 M.S.P.R. 386, 389 (1989) ("In this case, the collective bargaining agreement prohibits the consideration of any prior disciplinary action if there has been no intervening disciplinary action within two years. . . . The administrative judge . . . erred by considering the evidence of both the 1981 and 1982 actions, since its consideration by the agency was prohibited under the terms of the collective bargaining agreement . . . .").

Here, a national arbitration decision has interpreted the collective bargaining agreement to provide that, in proceedings concerning an employee's challenge to a later disciplinary action, that action may not be supported with "a disciplinary action that was scheduled to be heard in Arbitration," and that therefore was not "finally adjudicated." *Fasser Decision* at 7. Under the applicable collective

bargaining agreement, moreover, a national arbitration decision has the same force as a provision of the agreement itself. *See supra*, p.24. Thus, on the basis of settled precedent, the holding of that arbitration decision must be regarded "in the same manner as are provisions of the agency's regulations." *Supra*, p.32. The Federal Circuit was therefore entirely correct insofar as it held that, in the postal context, the MSPB may not rely on prior disciplinary actions that are still the subject of a pending grievance. Any other rule would result in "the very inconsistency and forum shopping that Congress sought to avoid." *Cornelius*, 472 U.S. at 662.

E. The Procedural Protections to Which the Postal Service Points Do Not Render the Narrow Rule Unnecessary.

The Postal Service does not seriously contest that there is considerable unfairness in allowing reliance on a prior disciplinary action that has not and never will be arbitrated. *See* Br. 31 ("the potential unfairness that concerned the court below"). But, the Postal Service submits, that unfairness will never come to pass, because two existing safeguards will prevent it. *See id.*; *see also* Br. 27 ("the MSPB's rule governing the consideration of prior disciplinary actions provides employees with ample procedural protections"); Br. 37 ("[t]he elaborate procedures established by the CSRA and the MSPB — including the *Bolling* rule and reopening procedure — provide employees more than sufficient process"). Regrettably, the Postal Service is mistaken.

1. The Postal Service points out that, under *Bolling*, the MSPB will permit collateral attack of prior disciplinary actions if the employee has not been afforded an opportunity to challenge them. Thus, the Postal Service claims, "[t]he *Bolling* rule governing the consideration of prior disciplinary

actions ensures that the employee does not lose the protections that accompany adverse action by agency reliance on prior minor discipline unaccompanied by such protections." Br. 28. That, however, is not so. The *Bolling* rule does permit collateral attack of prior disciplines, but does not always permit *de novo* review. *De novo* review is available only in the small class of cases in which an employee has had no "opportunity to dispute" the prior disciplinary action at all. *Bolling*, 8 M.S.P.B. at 659.

The "opportunity to dispute" trigger is a sensitive one indeed. Under MSPB precedent, an employee is deemed to have had an "opportunity to challenge" when the employee merely initiated the grievance process, even if the grievance was in the early stages and had not yet reached arbitration. *See, e.g., Wilson v. Department of Justice*, 58 M.S.P.R. 96, 99 n.2 (1993).[15] The first steps of the grievance process, however, typically involve nothing more than a decision by management. *See* Agreement Art. 15.2. Although these initial steps are important in that they often result in a compromise that both parties can accept, *see* Postal Service Br. 34 n.11, the deciding officials obviously are not impartial. To the contrary, they have an inherent incentive to overcharge in the early stages of the process so as to be able to bargain down penalties during later stages. *See* Br. in Opp. 22.[16]

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[15] Indeed, the present case illustrates just that: the Administrative Judge held that, because "the appellant had the opportunity to grieve [the prior disciplinary actions], the Board's review of a prior disciplinary action is limited to determining whether that action is clearly erroneous." Pet. App. 36a-37a.

[16] To accord such decisions a "presumption of regularity," Postal Service Br. 36, therefore, is fundamentally out of keeping with the nature of the grievance process, *see* Br. in Opp. 21. Besides, rejection of the narrow rule would establish not just a "presumption" — it would establish

If the employee had any opportunity to challenge the prior disciplinary action at all, the standard is review for clear error only. *See Bolling*, 8 M.S.P.B. at 660. That standard is exceedingly deferential. *See*, *e.g.*, *id.* (clear error means that the Board "is left with the definite and firm conviction that a mistake has been committed") (internal quotation marks omitted); *Ally v. Department of Navy*, 58 M.S.P.R. 680, 683 (1993) (same); *Lewis*, 51 M.S.P.R. at 484 (same). Of the hundreds of cases that the MSPB has decided in the past 20 years, we know of only one case in which it found that clear error had occurred. *See Eichner v. United States Postal Service*, 83 M.S.P.R. 202, 210 (1999) (prior disciplinary actions imposed in connection with conduct that had already been penalized was clearly erroneous). In literally scores of other cases, the MSPB has held after only summary review that prior disciplinary actions were not clearly erroneous.[17]

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an *irrebuttable* presumption. As already explained, in the absence of the narrow rule, the regularity of prior disciplinary actions in many cases will never be tested at all.

[17] *See*, *e.g.*, *Morgan*, 63 M.S.P.R. at 61 ("Having reviewed the record evidence concerning the matter, the Board is not left with the definite and firm conviction that a mistake has been committed.") (internal quotation marks omitted); *Lewis*, 51 M.S.P.R. at 484 ("Because the prior actions relied upon by the agency are not clearly erroneous, they will not be discounted for this reason."); *Hubbard v. United States Postal Service*, 32 M.S.P.R. 505, 508-09 (1987) ("[T]he Board has considered the matter and finds that our review of the record does not lead to the conviction that a mistake was committed."); *Freeman*, 20 M.S.P.R. at 292 (same); *Walker v. Veterans Admin.*, 12 M.S.P.R. 491, 493 (1982) ("[U]pon consideration of appellant's arguments and the agency's written documentation of the prior actions, we are not convinced that they were clearly erroneous."); *Carr v. Department of Air Force*, 10 M.S.P.R. 498, 500 (1982) ("[O]ur study of the disciplinary notices and grievance papers of record does not lead to the conviction that a mistake was committed.").

With only the *Bolling* rule to protect an employee, then, it is still entirely possible to deny an employee any measure of meaningful review before an impartial official — in violation of the requirement that the agency sustain its burden of showing just cause "by a preponderance of the evidence." 5 U.S.C. § 7701(c)(1)(B); *see*, *e.g.*, *Hanson v. Tennessee Valley Auth.*, 18 M.S.P.R. 705, 707 (1984); *Johnson v. Department of Air Force*, 13 M.S.P.R. 236, 238-39 (1982). Moreover, even if the *Bolling* framework would afford the employee *de novo* review where arbitration has not yet taken place in the prior disciplinary action, the employee would of course still lose her right to the forum of her choice: arbitration.

2. The Postal Service argues that employees can find an additional measure of protection in the MSPB's reopening procedure, as set forth in 5 C.F.R. § 1201.118. *See* Br. 28. The Postal Service contends that, when the MSPB has affirmed an employee's disciplinary action in reliance on a prior discipline that is later vacated in the grievance process, the employee can seek reopening of her termination. *See id.* According to the Postal Service, "[t]he Board is receptive to such requests." Br. 22 (citing *Payne v. United States Postal Service*, 69 M.S.P.R. 503, 508 (1996), *Lopez v. Department of Justice*, 55 M.S.P.R. 644, 646 (1992), and *Jones*, 24 M.S.P.R. at 431). Thus, the Postal Service concludes that "[t]he ability to reopen MSPB decisions might well prove sufficient standing alone to protect employees." Br. 28.

But the MSPB's ability to reopen its decisions provides no solace at all to employees in respondent's predicament. As explained above, collective bargaining agreements commonly require that pending grievances be dismissed once the employee's removal becomes final. Thus, reopening will not help the employee at all: once the MSPB affirms her termination, prior grievance proceedings are discontinued.

Thus, an arbitration decision that might later merit a reopening of the MSPB's proceedings simply will not be forthcoming.

The MSPB decisions on which the Postal Service relies (Br. 22) simply do not address such circumstances. The employee in *Payne* had been terminated in reliance on a criminal conviction that was reversed on appeal after the MSPB affirmed the termination. Plainly, the employee's criminal appeal did not terminate with the MSPB's decision. The employee in *Lopez* was never terminated: in reliance on a previous disciplinary action that was later overturned by an arbitrator, the employer had imposed only a suspension — not a termination that would have cut off the employee's continuing right to rely on the grievance machinery. Finally, *Jones* is entirely inapposite, because that case did not involve reopening at all. The prior disciplinary action in *Jones* had been vacated in the grievance process after the administrative judge's decision but before the case reached the full MSPB.

II. AT A MINIMUM, THE COURT OF APPEALS' DECISION SHOULD BE LEFT UNDISTURBED INSOFAR AS IT PROHIBITED RELIANCE ON CASE 1.

Even if this Court were to reject the narrow rule, it should still leave the court of appeals' decision undisturbed insofar as it vacated the MSPB decision and remanded for a new decision untainted by reliance on Case 1. Respondent was terminated in reliance on three prior disciplinary actions. Of those three prior actions, the first, Case 1, has already been set aside in arbitration. *See supra*, p.11. Thus, under settled MSPB precedent, the MSPB was not entitled to rely on that prior disciplinary action. *See, e.g., Jones*, 24 M.S.P.R. at 431 ("Since [the appellant's] earlier ten-day suspension . . . was reversed by grievance, it was effectively cancelled and

thus should not be considered in determining a reasonable penalty for the current charge.").

Not surprisingly, therefore, the Postal Service conceded below that the decision of the court of appeals was correct insofar as it set aside the MSPB's decision and remanded for a new determination without consideration of Case 1. In its petition for rehearing, the Postal Service expressly and unequivocally stated that "the Court is correct that it is appropriate to return this case to the MSPB so that the board may make a determination whether the agency would have taken the same action based upon Ms. Gregory's two remaining disciplinary actions." *Supra*, p.14.

Although the Postal Service even now concedes that "a remand remains necessary to permit the court to consider the effect of the arbitrator's invalidation of one prior action," Br. 38, it half-heartedly attempts to back-track on its previous concession that the case must be remanded to the MSPB, *see* Br. 38-39. Thus, the Postal Service suggests that "the proper course may be for the Federal Circuit to resolve this appeal against respondent and for respondent to file a motion to reopen directly with the MSPB." Br. 39. That is appropriate, the Postal Service contends, because respondent neglected properly to place the arbitrator's decision in the record. *See id.*

It is not entirely clear what the Postal Service expects from this Court on this point. If the Postal Service truly believed that it is appropriate "to resolve this appeal against respondent," there presumably would be no need for the remand that it concedes is required. Perhaps the Postal Service is hoping simply for helpful language in this Court's opinion. But, if even the Postal Service does not have the courage of its convictions, it is unclear why this Court should address the matter. The much more obvious approach would

be simply to let this aspect of the court of appeals' decision stand undisturbed.

In any event, even if the Court were inclined to entertain the Postal Service's uncertain suggestion, that suggestion should be rejected. *First*, the Postal Service's concession in its rehearing petition was unequivocal and directly contrary to what it argues now. Thus, that concession gives rise to judicial estoppel. *See, e.g., New Hampshire v. Maine*, 121 S. Ct. 1808, 1814-15 (2001). *Second*, the Postal Service waived the point by failing to raise it in its petition for a writ of certiorari. Nothing in the petition suggested that the Postal Service intended to challenge even this aspect of the court of appeals' decision.[18] *Finally*, the court of appeals was plainly correct in taking judicial notice of the arbitrator's decision. That decision is a matter of public record, and therefore does not need to be formally entered into evidence — no more than, say, a new judicial decision.[19]

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[18] The Postal Service for the first time addressed the issue in its reply brief, making the same half-hearted proposal that it makes now. *See* Reply Br. 7 n.4. That proposal came too late. *See, e.g., Bray v. Alexandria Women's Health Clinic*, 506 U.S. 263, 280 (1993) ("it is the petition for certiorari (not . . . later briefs) that determines the questions presented"); *Irvine v. California*, 347 U.S. 128, 129 (1954) (plurality) ("disapprov[ing]" of "practice of smuggling additional questions into a case after [Court] grant[s] certiorari").

[19] *See, e.g., Consolidation Coal Co. v. United Mine Workers*, 213 F.3d 404, 407 (7th Cir. 2000) (Posner, J.) ("The decisions of the other three arbitrators were not evidence — the sort of thing a prohibition against reopening the record would cover. They were the arbitral equivalents of judicial decisions, of which, of course, a court can take judicial notice . . . ."); *Stacks v. Southwestern Bell Yellow Pages, Inc.*, 27 F.3d 1316, 1326 n.3 (8th Cir. 1994) (taking judicial notice of arbitration decision); *United States Postal Service and American Postal Workers Union, AFL-CIO*, 302 N.L.R.B. 767, 778 n.16 (1991) (arbitration decisions "are official documents and matters of public record"). The single decision on which the Postal Service relies (Br. 39) is unhelpful to its cause. That decision, *Fisher v. INS*, 79 F.3d 955, 963 (9th Cir. 1996) (en banc) — which was in any event severely limited in a later decision, *see Lising v. INS*, 124 F.3d 996, 998 (9th Cir. 1997) — had nothing to do with arbitration decisions, instead addressing the consideration of material that plainly was not a matter of public record.

III. THIS COURT SHOULD DISMISS THE WRIT AS IMPROVIDENTLY GRANTED.

As explained above, this Court should affirm on the basis of the narrow rule, or, at a minimum, leave undisturbed the aspect of the court of appeals' decision remanding for a new penalty decision without consideration of Case 1. In the alternative, the Court could dismiss the writ as improvidently granted. There are at least three separate reasons why that would be appropriate.

A. This Case Does Not Provide a Proper Setting To Consider Either the Broad or the Narrow Rule.

For the reasons explained in Part I of this brief, the Postal Service's challenge to the Federal Circuit's decision is a tempest in a teapot. The Postal Service has devoted its entire opening brief to challenging a rule that simply is not implicated in this case. There is no reason to believe that the Federal Circuit has embraced the broad rule that the Postal Service attributes to that court. Moreover, because respondent easily prevails under even the narrow rule that the court of appeals did adopt, respondent has no occasion to defend the broad rule that the Postal Service challenges. Plainly, then, if the Court were inclined to evaluate the broad rule's legal merit, this is not a proper setting for that task.

Nor is this case an appropriate vehicle to consider even the narrow rule. For one thing, there is not a single word in the Postal Service's brief challenging or otherwise addressing that rule. That is particularly remarkable because respondent's brief in opposition plainly put the Postal Service on notice

that respondent intended to rest on that rule. *See* Br. in Opp. 16-22. If the Postal Service intends to challenge the narrow rule, its failure to do so in its opening brief deprives respondent of a fair opportunity to respond to its arguments. For another thing, the narrow rule — which comes into play in only a small class of cases, *see supra*, p.28 — will continue to bind the Postal Service regardless of what happens in this case: the narrow rule has been adopted by a national arbitration decision that has the same force as a provision of a collective bargaining agreement, and therefore will be applied by arbitrators and the MSPB alike. *See supra*, pp. 32-34. Regardless, it is unclear why this Court should be enlisted to fine-tune MSPB rules to take account of a factual setting that has never been expressly addressed by the MSPB itself.

B. The Postal Service Failed To Preserve Its Arguments Below.

When respondent argued in her Federal Circuit brief that the MSPB erred by relying on unarbitrated prior disciplinary actions, the Postal Service did not respond by arguing what it so elaborately argues now — that the law *permits* reliance on such actions. *See supra*, p.12. Instead, the Postal Service submitted only that respondent had failed properly to raise that issue before the MSPB. *See id.* Although the Postal Service did challenge respondent's argument in its petition for rehearing, that challenge came too late. The Federal Circuit (like most circuits) will not hear a losing appellee to make legal arguments for the first time in a petition for rehearing. *See Pentax Corp. v. Robison*, 135 F.3d 760, 762 (Fed. Cir. 1998) ("[W]e decline to address the government's new theory raised for the first time in its petition for rehearing."). As this Court stated only last Term in another case arising from the Federal Circuit, "issues must be raised in lower courts in order to be preserved as potential grounds of decision in

higher courts." *Nelson v. Adams USA, Inc.*, 120 S. Ct. 1579, 1586 (2000).

At the certiorari stage, the Postal Service did not seriously deny that, unless it could reasonably be viewed as having addressed the issue in its court of appeals brief, this case would not properly be here. But the Postal Service contended that a single sentence in that brief *had* preserved the issue. *See* Reply Br. 5. That is simply wrong. The single sentence to which the Postal Service pointed said: "In determining the reasonableness of the penalty, Gregory's disciplinary record was correctly considered." Postal Service's Fed. Cir. Br. 16. That sentence had nothing to say about consideration of aspects of a disciplinary record that are subject to pending grievances and certainly did not put the court of appeals on notice of the argument presented to this Court.

Indeed, read in context, it is clear that the quoted sentence addressed an issue altogether distinct. The next three sentences in the Postal Service's brief read:

> This is particularly true here as Gregory was previously disciplined for the same infraction, and she was warned that it was a serious offense. This clearly establishes a pattern of dishonest conduct. This Court has held that "removal for dishonesty has been upheld by this court's predecessor on a number of occasions."

Id. (citation omitted). These sentences make plain that the preceding sentence was intended to address the question whether respondent's termination was unduly harsh (and therefore vulnerable to reversal under *Douglas*) *assuming* that consideration of respondent's three prior disciplinary actions was permissible. That inference is fortified here because the Postal Service's waiver argument (countering respondent's argument that the MSPB had erred by relying on

unadjudicated prior disciplinary actions) was contained in a separate paragraph on a different page.[20]

Thus, the court of appeals simply was not "fairly put on notice as to the substance of" the Postal Service's objection to the narrow rule. *Nelson*, 120 S. Ct. at 1586.[21] Moreover, the most plausible interpretation of the court of appeals' denial of rehearing is that it determined that, if the Postal Service had any legitimate objection to either the broad or the narrow rule, that objection had been waived insofar as this case was concerned: it is unlikely that the court of appeals would have refused to rehear a serious government argument that previously had been made but overlooked. This Court usually will not entertain arguments when a court of appeals has determined that they were not adequately preserved. *See Wharf (Holdings) Ltd. v. United Int'l Holdings, Inc.*, 121 S. Ct. 1776, 1780 (2001).[22]

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[20] Besides, even assuming that the author of the first sentence subjectively intended to address the issue of reliance on unadjudicated prior disciplinary actions, the court of appeals was under no duty to tease that meaning out of a sentence that, objectively considered, did not say it. *See, e.g., United States v. Zannino*, 895 F.2d 1, 17 (1st Cir.) ("[I]ssues adverted to in a perfunctory manner, unaccompanied by some effort at developed argumentation, are deemed waived. . . . Judges are not expected to be mindreaders.") (internal quotation marks omitted), *cert. denied*, 494 U.S. 1082 (1990); *Carducci v. Regan*, 714 F.2d 171, 177 (D.C. Cir. 1983) ("[w]e will not resolve that issue on the basis of briefing and argument by counsel which literally consisted of no more than the assertion of violation of due process rights") (Scalia, J.).

[21] Accordingly, it ill behooves the Postal Service now to criticize the court of appeals for the brevity of its discussion. *See* Br. 29, 30.

[22] This Court *has* said that "[i]t is a permissible exercise of our discretion to undertake review of an important issue expressly decided by a federal court where, although the petitioner did not contest the issue in the case immediately at hand, it did so as a party to the recent proceeding upon which the lower courts relied for their resolution of the issue, and did not concede in the current case the correctness of that precedent." *United States v. Williams*, 504 U.S. 36, 44-45 (1992). But that exception to the normal waiver rules is plainly inapplicable here. The Postal Service has never addressed the issue of reliance on unadjudicated prior disciplinary actions — here or elsewhere.

C. The Broad and Narrow Rules Are of Only Academic Significance to This Case.

Even if any issue concerning consideration of prior disciplinary actions was properly preserved, that issue has little bearing on this case. As discussed above, the Postal Service has conceded that, in light of the arbitral decision vacating Case 1, a new penalty decision must be made. *See supra*, p.14. And, in light of applicable principles of "progressive discipline," *see supra*, p.4, the Postal Service cannot sensibly re-impose termination as the penalty in this case — even if the remaining disciplinary actions in Cases 2 and 3 could properly be considered.

The Postal Service penalizes successive infractions — unless so serious as to warrant immediate termination — in a series of penalties of increasing severity. *See supra*, p.4. As illustrated by the facts of this case, four levels of punishment are commonly used: (1) letter of warning, (2) 7-day suspension, (3) 14-day suspension, and (4) removal. *See* Agreement Arts. 16.3-16.5. Contrary to the Postal Service's implication (*see* Br. 25-26), this system of progressive discipline is hardly a matter of administrative grace. Where the Postal Service imposes a penalty that is out of keeping with the usual progression, either an arbitrator or the MSPB will set it aside on the ground that "cause" has not been established.[23]

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[23] *See* Agreement Art 16.1 ("[D]iscipline should be corrective in nature, rather than punitive. No employee may be disciplined or discharged except for just cause . . . ."); *see also Sublette v. Department of Army*, 68 M.S.P.R 82, 89-90 (1995); *Castellanos v. Department of*

It is undisputed that respondent cannot and will not legally be terminated if none of her three prior disciplinary actions may be considered. And it is extremely unlikely that the Postal Service would be permitted to terminate respondent even if Cases 2 and 3 may be considered. As even the Administrative Judge recognized, respondent's termination was a borderline removal case even with three prior disciplinary actions in her record. *See* Pet. App. 37a. With one of those actions removed, then, a removal penalty plainly could not survive *Douglas* scrutiny. Indeed, even the Postal Service itself cannot bring itself to say more than that, "even considering the arbitrator's decision expunging the *first* disciplinary action, respondent's removal *may* still be supported by substantial evidence." Br. 39 n.13 (second emphasis added).

With Case 1 removed from the mix, therefore, the MSPB would no doubt mitigate respondent's punishment to a non-removal penalty — say, a 14-day suspension. *Cf. Hagmeyer* v. *Department of Treasury*, 757 F.2d 1281, 1285 (Fed. Cir. 1985); *Lopez*, 55 M.S.P.R. at 646-47; *Jones*, 24 M.S.P.R. at 431; *Douglas*, 5 M.S.P.B. at 330-31, 341. Thus, consideration of Cases 2 and 3 holds small practical significance: whereas Case 4 without any prior disciplinary actions would not merit more than a letter of warning, Case 4 with consideration of Cases 2 and 3 still would warrant at the very most, say, a 14-day suspension.[24] There is no pressing reason why the difference (two weeks' worth of back pay) need consume this Court's attention.

Army, 62 M.S.P.R. 315, 324 (1994); *Whitmore v. Department of Navy*, 34 M.S.P.R. 137, 140-41 (1987); *Crumbaker v. Department of Labor*, 7 M.S.P.R. 84, 89-90 (1981).

[24] Meanwhile, moreover, the pending arbitrations in Cases 2 and 3 would be revived, which might result in further mitigation later.

CONCLUSION

The judgment of the court of appeals should be affirmed. In the alternative, the writ should be dismissed as improvidently granted.

Respectfully submitted,

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